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March 13, 2018

THPO File Number: 2017-63

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Ex Parte Communication via Electronic Submission

Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket 17-79

Streamlining Deployment of Small Cell Infrastructure by Improving Wireless Facilities Siting Policies, WT Docket No. 16-421

Wireless Infrastructure Streamlining Report and Order (Second Report and Order), WT Docket No. 17-79

Dear Ms. Dortch

The Thlopthlocco Tribal Town Tribal Historic Preservation Officer (THPO) offers the following comments for consideration prior to the March 22nd, 2018 meeting. The open dockets on this issue (WT 17-79 and WT 16-421) are considering and proposing changes to the Federal Communications Commission's (FCC) compliance with environmental and cultural resource laws and regulations. As has been expressed previously by Thlopthlocco Tribal Town and the THPO, these are important decisions and regulations that could potentially be utilized as detrimental precedent for compliance with historic preservation laws and regulations by this agency and other agencies. The THPO expressed this same concern regarding the first report and order in November, 2017. The current report and order is using the initial report and order as precedent to justify the actions proposed within this report and order (paragraph 70 –footnote 119 for example). Therefore, our concerns are justified and contain merit and any comments contradicting this statement should be viewed as willfully and intentionally misleading and ignorant of the facts.

Thlopthlocco Tribal Town (Tribe) supports the telecommunication industry efforts to deploy broadband throughout the country and we hope that Indian country will benefit from these efforts as has been stated through numerous responses and requests to the FCC relating to these

issues. Tribal lands tend to be the least represented in terms of broadband deployment. Unfortunately, the current broadband rollout is appearing to be no different than all of the previous ones and will not appreciably increase broadband deployment to rural areas despite Chairman Pai's, Commissioner O'Reilly's and Commissioner Carr's continued insistence that it will. Montgomery County, MD completed an initial analysis of 215 small cell deployments within their county and only 11 of these deployments were in areas with less than 1,000 people per square mile (source: https://www.nytimes.com/2018/03/02/technology/5g-cellular-service.html?hp&action=click&pgtype=Homepage&clickSource=story-heading&module=second-column-region&region=top-news&WT.nav=top-news). Tribal lands typically contain a population density considerably lower than even 1,000 people per square mile. Standing Rock Sioux Tribe for example has a population density of 0.4 persons per square mile so it leaves all of the Tribes pondering the question if we will receive any coverage at all given that broadband deployment is a profit based industry and there is no profit to be made with such low population densities across Tribal lands. The Tribe values preserving and protecting our places of cultural and religious significance and reaffirms the positive history of working with the FCC and industry in supporting both historic preservation and broadband deployment with particular reference to the Tower Construction Notification System (TCNS) in place at the FCC as a positive working partnership between the FCC and the Tribe.

Over the past year and a half, our tribe has been actively involved in the discussions and proposals to modify the FCC procedures in place for your agency to comply with the National Historic Preservation Act (NHPA) by submitting comments to FCC documents and actions which have all been conducted without proper Tribal consultation occurring beforehand. The rules and actions proposed by the FCC have the potential to affect properties of religious and cultural significance despite the FCC claims to the contrary. The Tribe maintains that the FCC has not conducted proper government to government consultation with Thlopthlocco Tribal Town as requested by Tribal leadership through multiple requests beginning in 2016 and required under 36CFR800.2 (c) (2) (ii) of the National Historic Preservation Act (NHPA). Government to government consultation requires face to face consultation with Tribal leadership and the Business Committee. There has been one phone call between the FCC and Thlopthlocco Tribal Town leadership in the last year and half which occurred on February 2nd, 2018 with the intention to begin face to face meetings at a later date which have still not happened. The FCC organized 3 phone calls with Tribal representatives in January and scheduled a meeting in Albuquerque, New Mexico on Feb 21st, 2018. Within one month they equaled the same number of meetings they originally scheduled throughout all of 2017 regarding the Notice of Proposed Rulemaking (NPRM). These three teleconferences and single meeting were conducted in what can only be viewed as a rush to conduct any type of consultation with Tribes before issuing the latest report and order. The THPO also maintains that this is intentionally misleading in order to appear that they are conducting any manner of

"consultation" with Tribes to support the second report and order in terms of outreach to Tribes regardless of how that Tribal outreach was conducted. The Tribes perceived these telephone calls and the meeting in New Mexico as being informational only as was expressed by numerous Tribes at every one of these meetings and phone calls. When the FCC was questioned about Tribal consultation at the New Mexico meeting, one of the FCC attendees questioned the other if Tribal leadership was invited and the response was that yes, they were. Apparently, in the opinion of the FCC, requesting attendance of Tribal leadership somehow fulfils an unknown FCC Tribal consultation requirement which is simply not the case. The Tribes have repeatedly informed the FCC of our individual tribal consultation and government to government requirements as sovereign nations yet the FCC just keeps ignoring us.

The FCC has given the Tribes no indication of when they will be pushing through documents such as the Report and Orders or Program Comments despite our repeated requests for this information. Representatives for the Tribes at the February 21st meeting specifically asked if we should be expecting any action on any of the items listed on the agenda for the meeting within the next two months and the FCC had no substantive response. The second report and order was referenced by Commission Carr in a meeting on February 28th, 2018 and was released on March 1st, 2018. Given the size of the document, there is no way that the representatives in attendance at the February 21st, 2018 meeting in New Mexico were not aware that this report and order was already substantially further along than a draft document and was nearing completion. This further supports the assertion that the FCC is disingenuous in all of its efforts regarding the NPRM and any documents associated with it including their attempts at their own version of Tribal consultation.

The FCC has gone to great lengths within the document to discuss their Tribal consultation compliance. In fact, Section II-part B (paragraphs 16-32) is completely devoted to documenting their Tribal consultation compliance. However, this policy does not recognize Tribal sovereignty or if it does the FCC is not following it as the FCC has done everything they can to not engage the Tribes in a manner which respects Tribal sovereignty regarding each Tribe's own requirements for Tribal consultation. Every "consultation" mentioned in this report and order was not viewed as consultation by the attendant Tribes but was viewed as information gathering meetings only. Our Tribe has repeatedly stated our Tribal consultation requirements at every single meeting we have held with the FCC that Tribal consultation requires face to face meetings with Tribal leadership. We have also stated this in every comment we have made as far back as September, 2016. The FCC has gone to great lengths to not frame this as part of the consultation requirements of Section 106 (36CFR800.2 (c) (2) (ii) (B)) which requires that "Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty" in order to avoid compliance with that section of the regulations and instead has relied on their own Tribal Policy which does not contain such requirements. Additionally, the FCC is not required to follow executive orders (E.O.) as they are an independent federal agency and resort to using that statement as their defense for not complying with E.O.'s such as E.O. 13175 which recognized Tribal rights of self-government and Tribal sovereignty and affirmed

and committed the federal government to work with Tribal governments on a government-to-government basis. The FCC policy of there being no requirement to comply with E.O.'s was personally explained to me at the meeting with FCC staff on February 5th, 2018 when I questioned them on their compliance with specific E.O.'s. However, E.O. 13084 "*Consultation and Coordination with Indian Tribal Governments*", encouraged independent federal agencies to be guided in their duties by principles of respect for Indian Tribal self-government and sovereignty, for Tribal treaty rights and other rights, and for the responsibilities which arise from the unique federal trust relationship. The FCC is completely ignoring this E.O. even though independent federal agencies were specifically addressed within it. The FCC is failing to recognize the Tribe's sovereign right to define what constitutes tribal consultation and to not have that definition imposed upon them by the federal government. The FCC has no authority to define what constitutes tribal consultation for a Tribe despite their repeated attempts to do so as evidenced within this report and order in Section II-Part B. Each Tribe defines Tribal consultation for their Tribe, not the federal agency applying a blanket definition as the FCC is attempting to accomplish in this report and order. Once again, the FCC's actions and statements regarding Tribal consultation can only be viewed as disingenuous.

Thlopthlocco Tribal Town has repeatedly stated our requirements for government-to-government consultation which requires face to face meetings with Tribal leadership. Numerous other Tribes have also stated the same requirements for government-to-government consultation (Cheyenne River Sioux Tribe at the meeting conducted at the Rosebud Sioux Tribe reservation in South Dakota on June 08, 2017 and in their comments submitted for this docket dated July 14th, 2017 for example). The FCC has gone to great lengths to not frame this as part of the consultation requirements of Section 106 (36CFR800.2 (c) (2) (ii) (C)) which states that "Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government or the governing body of a Native Hawaiian organization. Consultation with Indian tribes and Native Hawaiian organizations should be conducted in a manner sensitive to the concerns and needs of the Indian Tribe or Native Hawaiian organization." in order to avoid compliance with that section of the regulations and instead has relied on their own Tribal Policy which does not contain such requirements. Once again, the FCC is not recognizing Tribal sovereignty as it relates to our definition of what constitutes government-to-government consultation and is instead only recognizing their own internal policy of what that might entail. The FCC has no authority to define what constitutes government-to-government consultation for a Tribe despite their repeated attempts to do so as evidenced within this report and order in Section II-Part B. Each Tribe defines government-to-government consultation for their Tribe, not the federal agency applying a blanket definition as the FCC is attempting to accomplish in this report and order. Once again, the FCC's actions and statements regarding government-to-government consultation can only be viewed as disingenuous.

There is considerable discussion within the report and order aimed at addressing the public benefit of deployment and if the public benefit or interest is best served by complying with historic preservation laws (see comments in paragraphs 3, 11, 15, 36, 37 as a select list of just a few examples where it is being mentioned). This discussion centers on how it is not in the

public interest to burden industry with the costs of historic preservation compliance for both time and financial reasons and instead the public interest is best served by rapid deployment of broadband so that people can live stream football games and look into to their refrigerators while grocery shopping. However, what the FCC fails to address throughout the entire document is that Section 1 of the NHPA also address the public benefit:

> ... (b) The Congress finds and declares that—
>
> (1) the spirit and direction of the Nation are founded upon and reflected in its historic heritage;
>
> (2) the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people;
>
> (3) historic properties significant to the Nation's heritage are being lost or substantially altered, often inadvertently, with increasing frequency;
>
> (4) the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans;
>
> (5) in the face of ever-increasing extensions of urban centers, highways, and residential, commercial, and industrial developments, the present governmental and nongovernmental historic preservation programs and activities are inadequate to insure future generations a genuine opportunity to appreciate and enjoy the rich heritage of our Nation;
>
> (6) the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development; and
>
> (7) although the major burdens of historic preservation have been borne and major efforts initiated by private agencies and individuals, and both should continue to play a vital role, it is nevertheless necessary and appropriate for the Federal Government to accelerate its historic preservation programs and activities, to give maximum encouragement to agencies and individuals undertaking preservation by private means, and to assist State and local governments and the National Trust for Historic Preservation in the United States to expand and accelerate their historic preservation programs and activities

Point 4 specifically stipulates that it is in the public interest to protect this irreplaceable heritage yet the FCC is determined to ignore this statement in its analysis and limited definition of public

benefits throughout the document and has instead only focused on the public benefit in terms of industries costs in time and finances associated with deployment. The FCC also inexplicably states that the public benefit is not served by complying with historic preservation laws due to the rising costs of compliance slowing down deployment. The THPO disagrees with this statement as will be addressed in our comments for paragraph 11 of the report and order.

The FCC also fails to address that pursuant to Section 2 of the NHPA:

> It shall be the policy of the Federal Government, in cooperation with other nations and in partnership with the States, local governments, Indian tribes, and private organizations and individuals to-
>
> (1) use measures, including financial and technical assistance, to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
> (2) provide leadership in the preservation of the prehistoric and historic resources of the United States and of the international community of nations and in the administration of the national preservation program in partnership with States, Indian tribes, Native Hawaiians, and local governments;
> (3) administer federally owned, administered, or controlled prehistoric and historic resources in a spirit of stewardship for the inspiration and benefit of present and future generations;

Once again, point 3 specifically addresses the public benefit associated with historic preservation and the FCC is ignoring it in their limited analysis and definition of public interest in order to appease industry needs and demands. The FCC is also failing in its responsibility to foster partnerships between federal agencies, Indian Tribes and private organizations as repeated requests have been made by the Tribes to meet with both industry and the FCC at the same time to address concerns on all sides. I was in attendance when this request was made at both the Oct 4th, 2017 meeting in Washington, DC and the February 21st, 2018 meeting in New Mexico by individuals representing the Kaw Nation. There has never been any response to this request nor has any such meeting been arranged. Once again, the FCC is disingenuous in their Tribal consultation record as the meetings and teleconferences were certainly held but the comments raised in those meetings are more often than not outright ignored by the FCC and their check box is completed that they held Tribal consultation in their view despite the complete opposite view stated by multiple Tribes at every teleconference and meeting.

Page 4-5; Paragraph 11

> In addition to costs related to NEPA compliance, we sought comment on the costs of compliance with Section 106. The record indicates that the primary source of concern is the cost of the Tribal review process that is part of our Section 106 obligations. Since the

> Tower Construction Notification System (TCNS) was launched in 2004, many Tribal participants have made changes in how they participate, and the record indicates that the cumulative impact of these changes has diverted significant resources to regulatory compliance, thereby slowing wireless deployment without any corresponding public benefit. A number of commenters have offered evidence of increasing costs associated with Tribal participation in Section 106 review.

Has the FCC conducted any impartial investigation into these claims or have they just accepted the industry at their word that this is the case? The FCC relies on industry to be self-regulating in terms of FCC compliance so it is no surprise that the answer will be no to this question. The evidence for the preceding statement is directly attributable to discussions between myself and FCC staff regarding the first report and order and compliance with the stipulations contained within it which are required to be complied with in order to circumvent historic preservation regulations regarding replacement poles (within a certain number of feet of the original pole for example). The FCC has stated that they do not have any information regarding the actual locations of the replacement poles after I requested it nor do they require that information be provided to them from industry which in turn means that industry is self-regulating in regards to replacement poles and the stipulations required to be in compliance. This contradicts Section 106 in which the federal agency is ultimately responsible for compliance with Section 106 (36CFR800.2 (A)). The FCC maintains that as 38CFR800.3 (a) (1) was invoked, their compliance with Section 106 is complete. However, as the FCC imposed stipulations regarding when 36CFR800.3 (A) (1) will be invoked they are still legally bound to ensure that those stipulations are adhered to before 36CFR800.3 (A) (1) can be invoked for an undertaking and they are failing to do so by allowing industry to self-regulate.

There are many comments throughout the report and order that deployment will be slowed due to costs associated with historic preservation and in particular Tribal review (paragraph 15 and footnote 33 for example). Deployment has not slowed at all regardless of any increases in the costs of such deployments. Thlopthlocco Tribal Town responded to 1113 Section 106 requests through TCNS in fiscal year 2017. Our office reviews TCNS applications for the entire states of Georgia and Alabama and select counties within 9 other states. This is not a small number of responses and definitely does not exhibit the burden which industry is claiming in regards to deployments slowing due to financial constraints imposed by fees. Two major industry associations have collectively reported owning 4,298 towers that could be classified as Twilight Towers (see program comment for Twilight Towers footnote 4) during the Twilight Tower period (June 2001 through March 2005). Let's assume that the number reported within the Program Comment is inaccurate and is higher; even if 10,000 towers were constructed during that four-year period that only equals 2500 each year across the entire nation. My office responded to 1113 in fiscal year 2017 for responses to TCNS pertaining to considerably less than one tenth of all tower construction across the nation. Deployment has increased regardless of any associated increase in costs incurred by industry related to tower deployment despite the industry and FCC claims to the contrary.

> A number of commenters have offered evidence of increasing costs associated with Tribal participation in Section 106 review. Furthermore, many of these changes have accelerated in recent years. In 2012, the Commission was aware of 35 Tribal Nations charging fees. By 2015 at least 56 charged upfront fees, and in 2018, we estimate that around 104 do.

What exactly is the point of this comment? The FCC and industry commenters are failing to account for the fact that the number of THPO's also increased during this time period. In fiscal year (FY) 2012 for instance there was 132 THPO offices throughout the country. Currently, in FY 2018 there are 171 THPO offices. Does the FCC and industry expect the number of THPO's to remain static throughout time and never increase so that their associated costs don't either? It appears that industry and FCC expect the Tribes to remain static and locked throughout time and that there should never be any more than 35 Tribes requesting fees since that was the level in 2012. The next step would be to reverse it to 2005 when no Tribes requested fees as that fits industries goals and needs better. That is essentially what this comment implies, that the Tribes are static entities locked in time and should never change because it affects how we, as an industry, want to conduct our business. Where dos this line of thinking end? Tribes should still be living in traditional houses using bows and arrows and subsisting on hunting, fishing and collecting berries or harvesting maize, beans and squash? Tribes are not static entities locked in time nor should we be expected to be. This comment addresses nothing except the fact that costs have risen due to additional participation in the TCNS program which is something that should be expected due to an increased number of THPO's in the National Park Service program and with voluntary participation in TCNS. The industry and FCC continue to frame Tribes in a negative way as if there is some insidious plot behind everything that Tribes are doing when in fact there isn't when all of the facts are gathered.

Page 5-Paragraph 12:

> Furthermore, many Tribal Nations have expanded the geographic areas for which they seek notification, and as a result, according to staff research, the average number of Tribal Nations notified per project increased from eight in 2008 to 15 in 2017.

The FCC and industry commenters are failing to account for the fact that the number of THPO's also increased during this time period. In fiscal year (FY) 2008 there were 76 THPO's. Currently, in FY 2017 there are 171 THPO offices. Assuming that all THPO's participate in the TCNS system, Tribal notifications accounted for just over ten and a half percent of the number of THPO's requesting notification per project in 2008 (76 THPO /8 notifications per undertaking = 10.52 %). The number of Tribes requesting notifications per undertaking has actually decreased throughout the intervening years to 8.77% in FY 2017 (171 THPO /15 notifications per undertaking = 8.77%) despite an increase of 2.25 times the number of THPO offices during those same years (171/76=2.25). This comment endorsed by the FCC has little to do with expansion of geographic areas and more to do with an increase in number of THPO offices during those years. Yet again, the Tribes are framed in a negative manner in which we are expanding our geographic area of interest in an attempt to increase fees (see comments by Sprint on pages 5 and 6 -paragraph 13) when the numbers outlined above do not support this

contention. Even if some Tribes did in fact expand their geographic area of interest during this time period; that is their Tribal sovereign right to do so based on new information including, but not limited to, historic research and site typologies that Tribes identify as their own being found in new areas. It is not within the authority of the FCC to determine the geographic area of interest for a Tribe nor is it within the FCC's authority to restrict it for the interests of industry despite industries many requests to do so (Ibid.).

In terms of fees and the associated costs for Tribal review outlined negatively throughout the entire document. It is not within the authority of the federal agency to dictate to Tribes how much to charge for their services or to dictate that they cannot charge any fees nor is it within the authority of industry to demand that changes be made by the federal agency as they have no oversight over a sovereign nation. Once again, Tribes are sovereign nations that can set these fees and limits based upon recommendations made by our Tribal governing bodies which is fundamentally no different than any fees which the FCC imposes and has been approved by their governing body or for any other federal agency for that matter. In an industry that profits billions annually as a direct result of erecting more towers, my office has no sympathy to industries cries of historic preservation compliance costing too much. 5G deployment and its associated technology is expected to be a 250-billion-dollar industry by 2025 and even then that estimate seems cautionary and low. The cost to our Tribal history in the form of damage and destruction to our irreplaceable historic properties and history far outweighs any slight monetary decrease on industries bottom line which still profits billions annually despite the current historic preservation costs and will continue to do so. Unfortunately, the FCC is attributing more importance to industries profit margin than they are to their required compliance with historic preservation laws with these report and orders which contradicts the NHPA as outlined previously in these comments

Page 6- Paragraph 13:

Industry loves to make grandiose claims pertaining to how much it costs to conduct tribal review yet they never provide the variables relating to how those numbers were actually achieved. The Tribes are portrayed throughout the document in a negative light yet here is an example of industry withholding verifiable data to further their own goals. Nothing insidious about that at all. If the FCC had actually arranged a meeting between all consulting parties, some of these grievances could have been ironed out long before this report and order was ever issued. However, the FCC continues to fail in its responsibility towards historic preservation as outlined throughout this response.

The THPO does not agree that the numbers quoted in this paragraph actually represent the actual cost for the referenced undertaking as they seem to be little more than fabrication. Footnote 24 and the referenced footnote at 20 with the link to the Sprint article in support of how much Tribes were charging does not once mention Tribal fees associated with the undertaking. The article specifically only addresses Sprint's plans to be the first carrier to offer 5G in 2019. If Sprint and the FCC cannot actually reference comments correctly how then are we, as reviewers, supposed to trust their numbers? The simple answer is that we cannot and every quote and footnote within the entire report and order needs to be verified that it even

referenced the subject matter at hand. I realize that the FCC trusts industry implicitly to self-regulate but the rest of us do not have that luxury as we actually take our historic preservation requirements seriously.

Page 11 - Footnote 39

The FCC apparently assumes that inviting Tribal leadership to participate equals tribal leadership participation based on the comments in this footnote and this very comment was expressed by FCC participants at the February 21st, 2018 meeting in New Mexico. To quote the FCC in this footnote "We disagree". As outlined previously in this response, Tribes, as sovereign nations, define Tribal consultation not the FCC as they have no authority to define Tribal roles in consultation or what consultation entails for that matter. All of the Tribes at every Tribal meeting I attended informed the FCC that this meeting does not represent Tribal Consultation for their respective nation yet the FCC continues to ignore this. Consultation in this process can easily be defined as "to deliberate together". However, based on the comments in this footnote it is becoming apparent that the FCC has a different meaning for consultation which entails an invitation and attendance only as the key considerations with little to no actual meaning or consideration given to the subject matter actually discussed including the statements that the meeting does not represent Tribal consultation issued by the overwhelming number of attendees. This statement pertaining to the meetings not being Tribal consultation was reiterated by numerous Tribes on the recorded January 24th, teleconference yet despite this, the FCC still makes the claim that it was Tribal consultation. It was the very first question at the February 21st, 2018 meeting and the FCC admitted that it was not Tribal Consultation but was in fact informational only after a lengthy and heated exchange in which some Tribes threatened to leave because they did not agree with the interpretation that it was Tribal consultation. The FCC's entire Tribal consultation policy amounts to little more than a check box that you held a meeting as your agency obviously did not hear what was communicated or is willfully and intentionally ignoring all of the comments made at those meetings.

One of the intended purposes of the report and order is to document for the record that the FCC will not be considering small cell deployment as an undertaking which subsequently will not require any historic preservation review for its deployment. The FCC is incorrect in this assertion as they are incorrectly and illegally redefining the definition of an undertaking. The FCC has no authority to redefine the definition of an undertaking as this would require congressional action to modify an existing law.

The definition of an undertaking is codified in law at 36CFR800.16 (y) as:

> *Undertaking* means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.

There is quite simply no other definition for an undertaking regardless of what laws or court judgements the FCC quotes (see paragraph 34 and 35 for example). The FCC neglects to acknowledge that Tribes are not subject to any of the provisions within their acts or programmatic agreements as we are not signatory to them. Any rulings based upon those acts or programmatic agreements have absolutely no bearing on compliance with Section 106 as it pertains to Tribes. Our role is defined within the law as are the definitions which must be followed for compliance.

Notably absent from this definition is any mention that a key consideration in the definition of an undertaking is the level of federal involvement despite the FCC's repeated assurance and claims that it does throughout the report and order. The level of federal involvement in an undertaking is only referenced once in the regulations pertaining to the level of effort required to identify historic properties. An action which takes place well after a proposed project has been defined as an undertaking by the definition at 36CFR800.16 (y).

Page 13 – Paragraph 36

> ...we have never engaged in a considered analysis of whether the public interest requires such review for *all* wireless facilities.

Your review and the analysis associated with any such public interest inquiry are irrelevant to the discussion of whether or not a proposed project is an undertaking which is ultimately the issue at hand. If federal funds, a license, a permit or approval is issued, granted or dispensed then it meets the threshold for the definition of an undertaking. The public interest has no relevance to the topic being discussed and the FCC is just deliberately confusing the issue at hand by introducing topics that bear no meaning to the definition of an undertaking. This discussion lacks any merit and should be dismissed from any consideration.

> There is also no legitimate reason why next-generation technology should be subjected to many times the regulatory burdens of its 3G and 4G predecessors.

Unfortunately, there is. It is within the framework of the definition of an undertaking and can be expressed with a simple scientific formula:

> If A, B, C or D are granted, issued or dispensed, the requirements for X have been met
>
> Where:
>
> A = federal funds
> B = license
> C = approval
> D = permit
> X = the definition of an undertaking

The regulatory burden of costs associated with an undertaking are irrelevant to the discussion at hand and lack any merit and should be ignored in consideration of this report and order. Once again the FCC is deliberately confusing the issues at hand.

Page 13 – Paragraph 38

> The world of small wireless facility deployment is materially different from the deployment of macrocells in terms of the size of the facility, the importance of densification, and the lower likelihood of impact on surrounding areas.

The material difference between small cells and macrocell deployment is irrelevant. If the proposed project meets the definition of an undertaking, then consideration of the adverse effects that the proposed undertaking will have to historic properties must be initiated. The discussion on the amount of impact is irrelevant in all cases except where it can be determined that there is absolutely no potential for impacts and the FC can invoke 36CFR800.3 (a) (1). Once again, the FCC is confusing the issues at hand by introducing elements to the discussion that have no bearing in defining an undertaking.

Page 14 – Paragraph 39

> Third, our decision is consistent with the Commission's treatment of small wireless facility deployments in other contexts. For example, under the Collocation NPA, the Commission already excludes many facilities that meet size limits similar to those defined below from historic preservation review. Our decision today builds upon the insight underlying these existing rules that small wireless facilities pose little or no risk of adverse environmental or historic preservation effects.

Noticeably absent from this discussion on collocations is the requirement that the tower itself has been subject to historic and or environmental review before a collocation can occur. The "twilight towers" and the inability to collocate upon them for the last 13 years because they have not undergone such review is testament to the veracity of the previous statement. The size of the collocation is not the reason for exclusion of collocations rather, it is the fact that the tower subject to collocation has already undergone historic and or environmental review. This is a blatant attempt by the FCC to mislead reviewers of this report and order to the actual facts at hand regarding why collocations are not subject to review.

Page 14-Paragraph 40

> For example, we have not applied—and to a large extent could not realistically apply—these review requirements to consumer signal boosters, Wi-Fi routers, and unlicensed equipment used by wireless Internet service providers. Thus, the Commission has already, in effect, made a public interest determination that, even if we had the legal authority to do so, the cost of requiring NEPA and NHPA compliance for certain types of facilities outweighs the benefits.

This is yet another attempt by the FCC to mislead the reviewer. There is no federal undertaking associated with any of those items and as such they are not subject to review. The FCC is not issuing a license, approval or permit nor is it applying any federal funds to any of the items listed in this paragraph therefore the conditions for a federal undertaking have not been met despite the inference that somehow they could be based on the "in effect" statement. I am honestly interested in the answer to the question of who wrote this document? The FCC should consider firing that individual based on paragraphs 39 and 40 in the report and order assuming they actually work for the FCC.

More alarming to this discussion is the inference that NHPA compliance is somehow determined on a cost/benefit analysis regarding whether or not it should be undertaken. This is simply not the case. The FCC is obligated to fulfill the requirements of Section 106 of the NHPA once a project is determined to be an undertaking regardless of the cost benefit ratio. How is the FCC determining that there are no benefits to conducting historic preservation? What criteria were used to establish this cost benefit analysis? I'm not including the items listed in this paragraph of the report and order because it is absurd to include them in this discussion but the idea of some cost benefit analysis is mentioned throughout the document (see paragraphs 41, 58 and 61 for example).

Page 14 – Paragraph 41

> Fifth, while our amendment of Section 1.1312 to exclude small wireless facility deployments eliminates the only basis under CTIA and Commission precedent for treating such deployments as an undertaking or major federal action subject to NHPA and NEPA review…

Unfortunately, the only requirement for determining if a proposed project is an undertaking is outlined within the framework of the definition of an undertaking itself (36CFR800.16 (y) and commented upon previously in this response with the simple scientific formula. If any of those conditions are met, it's an undertaking regardless of CTIA or Commission precedent that determines otherwise.

> We also find little environmental and historic preservation benefits associated with requiring approval of environmental or historic preservation assessments for small wireless facility deployment. While "wireless providers will need flexibility to strategically place thousands of [distributed antenna system] and small cell facilities throughout the country in the next few years," Commission requirements to conduct environmental and historic preservation review pose significant obstacles to that deployment. We conclude that any marginal benefit that NHPA and NEPA review might provide in this context would be outweighed by the benefits of more efficient deployment of small wireless facilities and the countervailing costs associated with such review.

It is good to finally have the Commission on record expressing the view that historic preservation does not mean a thing to them. It was implied with the NPRM questions but the

FCC is finally admitting that they believe the cost to industries profit margins far outweighs any benefit from historic preservation compliance. To term historic preservation as a "marginal benefit" is particularly insulting and appalling given that the history we are trying to protect includes that of the United States of America. Without the sacrifices made by the Southeastern Tribes in giving up their homelands and being forcibly removed to Oklahoma, the United Sates would never have expanded into them. Without the imposition of the Dawes Act on the Tribes which further reduced our homelands and reservations, the expansion into the West would have never occurred. "Marginal benefit", what a delightful term to use for our combined history.

Page 14 – Paragraph 42

> We emphasize that our decision today is limited to small wireless facilities that are deployed to provide service under geographic area licenses and are not subject to ASR (antennae structure registration)

Geographic area licenses by definition are an undertaking regardless of your attempts to spin opinion that they are not with this report and order. The FCC is issuing a license which is one of the conditions in the simple scientific formula outlined to simply the process therefore it is an undertaking.

> Thus, we do not address whether, or the extent to which, site-by-site licensing or ASR render construction of the licensed or registered facilities a major federal action or undertaking. We also do not revisit the Commission's previous analyses as applied to facilities falling outside the scope of small wireless facilities covered by this Order. To the extent the Wireless Infrastructure NPRM sought comment on these questions, they remain pending.

So the Tribes can expect in another month to have a mad rush on "tribal consultations" to fulfil the FCC Tribal Policy with an agenda that may or may not actually be addressed with the issuance of a third report and order which attempts to redefine the definition of an undertaking based on the incorrect assumptions made in the current one and a two-week review time. Thank you for the heads up.

Page 18 – Paragraph 53

> The Commission did not consider whether, in the first instance, it could amend its rules to clarify that small wireless facilities are not Commission undertakings or whether the public interest would be served by doing so.

By now, it has been pretty well-established through this response that public interest should just be defined as industry profit margin as the FCC continues to ignore the fact the public interest entails many other factors including historic preservation compliance. In amending its rules, the

FCC must rely on the actual definition of an undertaking and not the factors considered within this report and order which have been demonstrated to have no merit.

Page 19 – Paragraph 55

> We exercise our discretion today to amend our rules to clarify that the deployment of small wireless facilities does not qualify as a federal undertaking or major federal action. As explained above, a federal undertaking or major federal action requires a sufficient degree of federal involvement, and the Commission has only ever identified two potential bases by which such involvement exists with respect to the deployment of wireless facilities that do not require preconstruction authorization.

Once again, to quote the FCC, "We disagree". The small wireless facilities deployed and reviewed under this report and order are subject to a Geographic Area License (GAL) and therefore meet the definition of an undertaking. There is simply no requirement for sufficient degree of federal involvement in determining if a federal project is an undertaking despite the FCC's claims. The only definition of an undertaking is outlined at 36CFR800.16 (y), any other clarifications have no merit including the level of federal involvement regardless of any supporting clarifications that the FCC is purporting exist including any clarification made by the ACHP regarding this issue. The referenced quote by the ACHP (see Footnote 149) states "The Agency Official is responsible, in accordance with § 800.3(a), for making the determination as to whether a proposed Federal action is an undertaking. As appropriate, an agency should examine the nature of its Federal involvement taking into consideration factors such as the degree of Federal agency control or discretion; the type of Federal involvement or link to the action; and whether or not the action could move forward without Federal involvement." However, once again the FCC is confusing the issue. 36CFR800.3 (a) is utilized in determining if an undertaking has any potential to affect historic resources not if a project is actually an undertaking. 36CFR800.3 (a) states:

> Establish undertaking. The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties.

Even 36CFR800.3 (a) refers to the definition of an undertaking being located at 36CFR800.16 (y) and not once does it mention degree of federal involvement. For the record, the ACHP is also incorrect in this analysis and quote when determining what constitutes an undertaking as it is plainly defined under 36CFR800.16 (y) but let us play along as if they are correct and I'll explain why small cells deployments are still undertakings. The first point the ACHP brings up is the degree of federal control or discretion. The FCC issues a GAL for the proposed project therefore federal control is well established. The second point is the type of federal involvement or link to the action. The federal involvement or link is the issuance of the GAL which fits the definition of an undertaking codified at 36CFR800.16 (y). The final consideration is whether or not the action could move forward without federal involvement. The use of the GAL allows the applicant to construct their infrastructure. Infrastructure creation is a foreseeable effect both cumulatively and later in time based entirely upon the issuance of the GAL to the applicant and

is therefore connected to it. Pursuant to 36CFR800.5 (a) (1) which states that "adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative" the Federal Agency is required to account for these adverse effects when determining the potential effects of an undertaking. The infrastructure could not be created for its intended use but for the issuance of the GAL to the applicant therefore this condition is also met. There would be no need on the part of the applicant to create any infrastructure without the permission to use the spectrum for which the infrastructure is intended to carry.

Page 20 – Paragraph 61

> We note, for example, that Verizon anticipates that 5G networks will require 10 to 100 times more antenna locations than previous technologies…

10 to 100 times the deployments equal 10 to 100 times the potential for adverse impacts to historic properties as a foreseeable future effect of small cell deployment yet this simple fact is downplayed within this report and order. The FCC cannot increase the deployment rate of small cells without also increasing the potential for adverse impacts to historic properties an equal amount. The two are not independent of one another despite what this report and order concludes.

Page 21 – Paragraph 62

> It would be impractical, extremely costly, and contrary to the purposes of the Communications Act to subject the deployments required for 5G technology to many times the regulatory burdens that the Commission previously imposed on 3G and 4G infrastructure.

Unfortunately, the burden of regulatory cost is not within the power to be decided by the FCC. If a proposed project is defined as an undertaking pursuant to 36CFR800.16 (y), it must be reviewed regardless of any regulatory burden. As has been expressed within this response, small cell deployments fit the definition of an undertaking

Page 21 – Paragraph 63

> The Commission has nevertheless made common-sense accommodations for types of deployments that have limited potential for environmental and historical preservation effects and for which compliance would be impractical. For example, the Commission does not subject consumer signal boosters, Wi-Fi routers, or unlicensed equipment used by wireless Internet service providers to Section 1.1312 review. Through today's Order, we apply similar considerations in determining that it is consistent with the public interest to eliminate NEPA and NHPA compliance requirements for all small wireless facility deployments as defined herein.

Once again, there is no federal undertaking associated with any of those items and as such they are not subject to review under the NHPA. The FCC is not issuing a license, approval or permit nor is it applying any federal funds to any of the items listed in this paragraph therefore the conditions for a federal undertaking have not been met despite the inference that somehow they could be. There have been no considerations given to any of those items under NHPA therefore this entire paragraph is without merit despite the FCC's insistence that there is.

Page 21 – Paragraph 64

> We further find, on balance, that the costs of requiring Section 1.1312 review for small wireless facilities outweigh the marginal benefits, if any, of environmental and historic preservation review.

Once again, it is good to have the Commission on record expressing the view that historic preservation does not mean a thing to them. It was implied with the NPRM questions but the FCC is finally admitting that they believe the cost to industries profit margins far outweighs any benefit from historic preservation compliance. To term historic preservation as a "marginal benefit" is particularly insulting and appalling given that the history we are trying to protect includes that of the United States of America.

Page 21- Paragraph 65

> In other words, the Commission's rules have required Sprint to spend tens of millions of dollars to investigate a minimal likelihood of harm.

The finding of minimal likelihood of harm can only be determined by following the existing process. The FCC and industry fail to account for the times when harm to a resource actually occurred or was avoided due to the Section 106 process which results in a final determination of no historic properties affected as will be outlined further in these comments.

Page 24- Paragraph 70

> We believe that this represents a better allocation of scarce resources.

The FCC's definition of scarce is certainly different that anyone else considering that the industry stands to profit 250 billion by the year 2025. That is the definition for excess not scarce.

Page 24- Paragraph 71

> To qualify as a small wireless facility, the antenna associated with the deployment, excluding the associated equipment, must fit in an enclosure (or if the antenna is exposed, within a hypothetical enclosure, i.e., one that would be the correct size to contain the equipment) that is no more than three cubic feet in volume. We agree with commenters that, at this size, small wireless facilities "are unobtrusive and in harmony

> with the poles, street furniture, and other structures on which they are typically deployed.

Notably absent from this discussion is the issue of multiple collocations on the same pole which cumulatively would exceed the volume restriction and would create an adverse impact. Additionally, this statement also fails to address the cables which are required to run to these small cell deployments which have the potential to affect historic properties. The entire report and order only address the actual tower or antennae and not the associated infrastructure that goes along with it and in fact they specifically exclude cable runs from historic preservation review in paragraph 40 of appendix C for no apparent reason. The cubic feet measurement in this section differs from the one listed in paragraph 40 of Appendix C which states that it is six cubic feet in volume.

Page 25- Paragraph 72

> Our expectations regarding the environmental and historic preservation consequences of removing small wireless facility deployment, as defined herein, from Section 1.1312 of the rules is also consistent with the Commission's treatment of small wireless facility deployments in other contexts, and supported by comments in the record.

Not included in the record of comments relating to this issue are any Tribal comments issued relating to the contrary opinion that historic properties will in fact be affected. Obviously as can be seen by the positive spin industry gets within the report and order the opinion of industry is valued more than the opinion of Tribes or other commenters.

Page 25-26 - Paragraph 73

> While a number of commenters argue that review confers environmental and historic preservation benefits, to the extent they provide factual support, they provide no more than anecdotal evidence of effects of small wireless facility deployment that have been addressed in limited cases. While other commenters identify specific factual scenarios of concern to them regarding small wireless facility deployment, there is substantial record evidence that actual instances of concern identified by review are few.

Once again, the bias of this document towards industry statements is echoed in this paragraph. Can the Tribes and other commenters review this substantial record of evidence you apparently have compiled on this subject? If you don't actually have one, this paragraph is without standing or merit. It is to be expected that any substantial record of evidence is comprised solely of industry comments based on this report and order thus far.

Page 26 - Paragraph 74

> Verizon, likewise, represents that between 2012 and 2015, only 0.3% of Verizon's requests for Tribal review resulted in findings of an adverse effect to tribal historic

properties, while AAR states that "more than 99.6 percent of deployments pose no risk to historic, tribal, and environmental interests.

Thank you for providing evidence relating to how the TCNS process functions so positively for Tribes. The industry fails to account for the fact that the end result of the TCNS process is identical to findings that result in No Historic Properties Affected or No Adverse Effect determinations. Adverse impacts only occur when a project cannot be mitigated or avoided by moving the tower for example. This low number of actual adverse effects is evidence that the TCNS system succeeds in what it was designed to do which is to help minimize adverse effects. Industry and the FCC will continue to attempt to spin it in such a manner that the process is not finding any potential adverse effects and that is simply not the case.

Page 26 - Paragraph 75

> In particular, Sprint deployed 23 small cells in Houston to upgrade its network in preparation for the crowds descending on Super Bowl LI. Even though the stadium construction itself did not involve any historical consultation with tribes under Section 106 of the NHPA (because the stadium construction was not a federal undertaking), carriers building an antenna in the parking lot were obligated by FCC rules to engage in the Section 106 process.

Why is this statement relevant? One is a federal undertaking, one is not therefore one requires review and the other does not. This is asinine. The FCC's obsession with this Superbowl is ridiculous and hold no merit in the discussions at hand when framed in the manner it is by the quoted reference above.

> That the Commission's rule would lead to such an anomalous outcome—requiring environmental and historic preservation review of small wireless facilities deployed in the parking lot of an NFL stadium that did not itself require such review—highlights what we see as the misdirected public interest consequences that would result if we applied Section 1.1312's approval requirement to small wireless facility deployment.

How is this anomalous? This is to be expected when one project is a federal undertaking (deployment of small cells) and the other is not (construction of the stadium). This will happen in every single instance when the two variables (undertaking, not an undertaking) coexist. Therefore, based upon the definition of anomalous this does not qualify unless the FCC has some new definition for anomalous much like they have a new definition for undertaking. There are no misdirected public interest consequences. It is in the public interest to conduct historic preservation compliance for all federal undertakings. The deployment of small cells is currently classified as an undertaking. Therefore, the public interest is met. It is appalling that the FCC is creating some equivalency between federal undertakings and non-federal projects when no such equivalency exists in order to confuse the issue by implying that the existence of the federal

undertaking is somehow dependent on the former non-federal project also being subject to the Section 106 process even though there was no federal tie to the project. This argument holds no merit.

Page 26 - Paragraph 76

> In short, the record evidence persuades us that the costs to small wireless facility deployment attributable to Section 1.1312's approval requirement far outweigh any incremental benefits of such environmental or historical preservation review.

Considering that historic sites are irreplaceable it is easy to make the assertion that this statement is patently false. The cost of not following the procedures as set forth by the NHPA far outweigh any cost benefit analysis or savings that industry will accumulate to increase their profit margins. As the Federal agency, you are obligated to account for impacts to historic properties once a proposed project is determined to be an undertaking which, despite your agencies and industries efforts, small cells clearly are. The FCC cannot minimalize or trivialize the issue in order to save industry the costs of complying with federal law. The public interest is best served by protecting irreplaceable historic sites not by live streaming a football game or being able to remotely connect to a refrigerator while shopping. The priorities of the FCC do not conform to the public interest unless once again you define public interest as industry profit margins.

Page 26 – Footnote 136

> We thus are unpersuaded that imposing Section 1.1312 of our rules on small wireless facility deployment would guard against disparate environmental and historic preservation review requirements for entities engaged in different types of deployment or construction

As previously mentioned, the first report and order is being used as precedent for this report and order. It is safe to assume that other agencies will use these decisions to eliminate historic preservation on their undertakings just as the FCC used other findings to support their initial report and order (ACHP for example) and this one.

Page 27 – Paragraph 77

> 1990 Order. As explained above, the Commission's 1990 Order did not specifically address whether the public interest was served by subjecting small wireless facility deployments to Section 1.1312's requirements. We now do so and find that it is not.

There were no small cell deployments during that time period so this comment is irrelevant.

Page 27 – Paragraph 78

> In a world in which a relatively small number of large structures were being built, such predictions might have made sense.140 But with the high volume of small wireless facility deployments that we anticipate being necessary to facilitate the provision of advanced wireless services, we anticipate that absent Commission action significant numbers of deployments—in fact, the vast majority of them—will be significantly delayed and detrimentally affected without any actual historic preservation or environmental benefit.

The FCC fails to address that no determinations of no historic properties affected, no effect, no adverse effect and a finding of no significant impact (FoNSI) are actually a benefit as these are the preferred outcomes of the process yet the FCC is mischaracterizing these findings into negative findings that produce no appreciable public benefit when that is simply not the case.

Page 27 and 28 – Paragraph 79

> In determining that small wireless facilities are not subject to historic preservation or environmental review obligations, we reject the position offered by some commenters that mere issuance of a broad geographic area service license constitutes sufficient federal action to convert small wireless facility deployments into undertakings and major federal actions, triggering NHPA and NEPA review. Certain commenters make general assertions that a geographic area service license could be sufficient to implicate NHPA and NEPA. We **disagree and find the Commission's role regarding such deployment too limited to render the deployments "undertakings" under the NHPA or "major Federal actions" under NEPA.**

Once again, the issuance of a license is one of the listed conditions in determining that a proposed project is an undertaking pursuant to 36CFR800.16 (y). The limited role of the Commission has no bearing on this as was discussed previously.

Page 28 – Paragraph 80

> As discussed above, the key consideration in determining whether a particular deployment is a federal undertaking is the degree of federal involvement, and the Commission has discretion to make the threshold determination as to whether that involvement exists.

No actually it is not, the key considerations are the requirements to determine that a proposed project is an undertaking as outlined in the definition of an undertaking and codified in law at 36CFR800.16 (y). No amount of mischaracterization, as outlined within this report and order,

can change what is or is not to be considered when determining whether a proposed project is an undertaking.

> We conclude that the Commission's issuance of a license that authorizes provision of wireless service in a geographic area does not create sufficient Commission involvement in the deployment of particular wireless facilities in connection with that license for the deployment to constitute an undertaking for purposes of NHPA

The issuance of a license in any form is defined as an undertaking regardless of your determination that you aren't involved in the undertaking. It is also interesting to note that your support for this statement is based entirely on industry comments and are therefore invalid as they are just supporting their own needs and goals. This is not supported by law. Once again, your bias is showing.

> In particular, although geographic area service licenses are a legal prerequisite to the provision of licensed wireless service, and can affect entities' economic incentives to deploy small wireless facilities—insofar as the facilities can be used to offer the licensed service—neither the geographic area service license nor any other Commission approval is a legal prerequisite to the deployment of those particular facilities.

The issuance of the license is by definition an undertaking which invalidates all of the statements before this one in terms of how it does not constitute a federal undertaking. By your own admittance, in this paragraph, it is a legal prerequisite for licensed wireless service. The applicant would have no need nor reason to construct wireless facilities but for the issuance of the geographic area service license therefore the two are connected as one undertaking.

> In particular, although NHPA requires agencies to evaluate the effects of their undertakings before those undertakings occur, as a practical matter, providers choose to engage in wireless facility deployment well after the Commission has issued the geographic area service licenses, and that deployment occurs in a manner and at locations that the Commission cannot foresee at the time of licensing.

This is irrelevant to the topic at hand. The NHPA does not differentiate between when the actual wireless deployment or possible impacts occur, only that the possible effects to historic properties are accounted for before the undertaking is approved. As has been outlined throughout these comments the actions of issuing the license and deployment of wireless facilities are interconnected as the latter will not occur but for the existence of the former. The construction of wireless facilities is easily viewed as foreseeable future effect pursuant to 36CFR800.5 (a) (1).

> We thus do not find the issuance of a geographic area service license, in itself, to provide the requisite level of Commission involvement in wireless facility deployment to render that deployment an undertaking under relevant court precedent and ACHP guidance

The issuance of the license defines it as an undertaking not the level of federal involvement. Your argument is invalid as it predicated on the false assumption that the level of federal involvement somehow supersedes the actual definition of an undertaking which it simply does not.

Page 29 and 30 – Paragraph 81 and 82.

As both of these paragraphs are based on false assumptions as outlined above, they should be ignored in consideration of this report and order.

Page 30 – Footnote 155

> See, e.g., 1990 Order, 5 FCC Rcd at 2942, para. 4 ("The Commission instituted this rule making proceeding to ensure that the Commission fully complies with Federal environmental laws in connection with facilities that do not require pre-construction authorization."); id. at 2943, para. 10 ("[O]ur responsibility under the environmental laws is to consider potential harm to the environment before it occurs, not simply to await environmental damage and then attempt to rectify it.").

This is exactly what will happen if this report and order is adopted. The FCC will be attempting to rectify damage after the fact due to there being no historic preservation review beforehand therefore this report and order is in violation of the 1990 order as outlined in this footnote. This matter has been discussed between my office and FCC staff during a meeting on February 5th, 2018 in which the FCC stated that they will investigate potential problems relating to adverse effects from replacement poles after they have been reported which implies that the adverse effect has already occurred.

Page 31 – Paragraph 84

> In addition, as the Commission recently observed, "[i]n implementing large-scale network densification projects that require deployment of large numbers of facilities within a relatively brief period of time, use of existing structures, where feasible, can both promote efficiency and avoid adverse impacts on the human environment."

The Commission is directly quoting its own NPRM with this quote. The Commission should not be quoting itself to justify their own actions and recommendations within the report and order.

> ...we are not persuaded that requiring federal environmental and historic preservation review for small wireless facility deployments will have a meaningful amount of benefits, particularly when this consideration is balanced against the other public interest considerations associated with promoting the deployment of small wireless facilities.

Considering that in almost every case, any comments that were not made by industry were dismissed, this conclusion comes as no shock or surprise. When the public interest is unfortunately redefined as industry profit margin there can be no other conclusion.

Page 31 – Paragraph 85

> Because we find the record of claimed potential benefits to be limited and otherwise fundamentally speculative, we also are not persuaded that some more streamlined review process or other alternative to the action we take is warranted in the public interest.

Please provide this record for review. An assertion such as this cannot be made without the evidence and supporting documents.

Page 32 – Paragraph 87

> We acknowledge, of course, the policy goals expressed by federal environmental and historic preservation statutes. But Congress prescribed specific triggers for the obligations that those statutes impose on federal agencies, persuading us that agencies' consideration of those statutes' more general policy pronouncements is simply to be weighed alongside consideration of our principal duties under our organic statutes. Thus, although the record does not persuade us of meaningful benefits that are likely to result from environmental and historic preservation review of small wireless facility deployments, even assuming arguendo that there are some benefits, we are not persuaded that they are likely to overcome the harms that we find run contrary to our responsibilities under the Communications Act, as informed by the 1996 Act. Accordingly, we find no basis to conclude here that it is in the public interest to apply Section 1.1312 to small wireless facility deployment, triggering environmental and historic preservation review

Congress prescribed specific triggers for the obligations imposed on federal agencies and codified one of those triggers in the definition of an undertaking at 36CFR800.16 (y) which the FCC has continued to mischaracterize throughout this entire report and order. The FCC does not have the authority to redefine the definition of an undertaking or to reexamine the intent of the definition. It is quite simply and easily defined within the regulations despite the FCC's attempts to confuse the issue with this report and order.

Page 36 – Footnote 194

> We note that this time period represents the average time to complete the full Tribal engagement process per project and not the average time for each Tribal Nation to complete review. See CTIA and the Wireless Infrastructure Association Joint Comments at i, 6 (stating that the average time for Tribal Nations to complete a request for consultation is 110 days); Verizon Comments at 51 (stating that for projects it submitted between 2014 and 2016, the average time for Tribal Nations to complete review was 75 days).

Please provide this data. Using unverifiable data to justify the actions contained within this report and order can be viewed as an arbitrary and capricious decision.

Page 37 – Paragraph 98

> We find that providing the detailed information included in the Form 620/621 submission packet constitutes a reasonable and good faith effort to provide the information reasonably necessary for Tribal Nations and NHOs to ascertain whether historic properties of religious and cultural significance to them may be affected by the undertaking.

Tribes are not bound to the requirements of your programmatic agreement as we are not signatory to it. Tribes, as sovereign nations, determine what review materials are necessary to ascertain whether there are any historic properties of religious and cultural significance present which may be impacted by the proposed undertaking not the FCC or any other federal agency.

> We clarify that to the extent that any such information exceeds what is required under the Wireless Facilities NPA to be included in a Form 620/621 submission packet, we require the applicant to provide it, if necessary, only after a Tribal Nation or NHO has indicated that a historic property may be affected and has become a consulting party.

Tribes are consulting parties the moment a proposed project becomes a federal undertaking as there is no other way to determine if the proposed undertaking will affect properties of religious and cultural significance to the Tribe pursuant to section 101 (d) (6) (B) despite the assertion within the report and order that third party consultants can somehow fulfil this role for the Tribes.

Page 37 and 38 – Paragraph 99

> We further clarify that, if a Tribal Nation or NHO conditions its response to an applicant's submission packet on the receipt of additional information beyond that

required in the Form 620/621 submission packet, an applicant should respond that the FCC does not require the applicant to provide this information.

It doesn't matter if the FCC requires it, it is the Tribe as a sovereign nation, who is requesting it, the requirements of the FCC have absolutely no bearing or influence on our requirements. The FCC is over-reaching its authority in attempting to dictate to Tribes how they will consult within the Section 106 process. As a gentle reminder, the Tribal Towns, as a form of governance, were in existence for over two hundred years prior to the revolution which created the United States of America and have been in continued existence now for over 400 years. It is extremely arrogant of the FCC to assume they possess any governing authority over Tribes.

Page 38 – Paragraph 100

Form 620/621 do not meet the documentation standards for determinations of effect required pursuant to 36CFR800.11 (d) or 36CFR800.11 (e) nor do they ever possess any such determinations yet we are supposed to accept using them. This is unacceptable.

Page 39 and 40 – Paragraph 101, 102 and 103

The 30-day time period is only referenced in the regulations when a determination of effect has been made and proper documentation has been submitted to support the determination. Your rules within the NPA have no authority over Tribal response times as we are not signatory to that document. The 620/621 forms do not meet the required documentation standards. The FCC does not have any authority to redefine how Tribes will participate in the Section 106 process.

Page 42 – Paragraph 110

> The ACHP's 2001 fee guidance memorandum addresses the practice of Tribal Nations and NHOs charging fees for their participation in the Section 106 process. In that memorandum, the ACHP distinguishes between Tribal Nations participating in Section 106 reviews in their capacity as government entities with a designated role in the process versus the possibility that they may be engaged to provide services in a different capacity, that of a consultant or contractor. The former capacity entails no obligation or expectation for the applicant to pay fees. The ACHP 2001 Fee Guidance explains that "the agency or applicant is not required to pay the tribe for providing its views." The ACHP 2012 Tribal Consultation Handbook echoes this guidance, and clearly states that no "portion of the NHPA or the ACHP's regulations require[s] an agency or an applicant to pay for any form of tribal involvement." Further, "[i]f the agency or applicant has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult and is free to move to the next step in the Section 106 process.

The Tribes provide services akin to that of archaeologists just with a different dataset. Archaeologists conduct background research to determine the presence or absence of archaeological and architectural resources while the Tribes conduct the same background research for our sites of religious and cultural significance. Is the FCC going to dictate to archaeologists that they are no longer going to be paid for the work they provide? There is really no distinct line between the role we possess in providing information and the role we would provide in the private sector and as such we should be compensated if our Tribal government has decided that we should. Additionally, Tribes possess specialized expertise in the identification of sites of religious and cultural significance which cannot be accounted for by any other means.

Page 43 –Paragraph 111

> The up-front fees requested by some Tribal Nations for providing their initial assessment as part of the Section 106 review process do not compensate Tribal Nations for fulfilling specific requests for information and documentation, or for fulfilling specific requests to conduct surveys. They are more in the nature of a processing fee, in exchange for which the Tribal Nation responds to the applicant's contact, and to the extent necessary, reviews the materials submitted before indicating whether the Tribal Nation has reason to believe that historic properties of religious and cultural significance to it may be affected.

If the Tribes governing body decides as a Tribal Nation to assign a processing fee as part of their sovereign rights, there is very little that the FCC, ACHP or any other government for that matter can do about it. The FCC and the ACHP cannot dictate to the Tribes when fees are appropriate if it is framed within our sovereign rights.

Page 43 –Paragraph 112

> A number of Tribal Nations have argued that Tribal sovereignty prohibits the Commission from establishing rules about fees. We emphasize that no action we take here questions or interferes with Tribal Nations' rights to act as sovereigns. We do not dictate or proscribe any actions by Tribal Nations. We simply clarify that nothing in the applicable law of the United States—the NHPA, ACHP rules, and the NPA—requires applicants (or the Commission for that matter) to pay up-front fees as part of the Section 106 process. Accordingly, Tribal Nations remain free to request upfront fees and applicants may, if they choose, voluntarily pay such fees. If, however, a Tribal Nation or NHO opts not to provide its views without an up-front payment, and the applicant does not voluntarily agree to provide the payment, consistent with the ACHP's guidance, our obligations have been satisfied and we may allow our applicant to proceed with its project after the 45-day period described above.

How is the last sentence not interfering with our sovereign rights? The FCC imposes fees and does not issue its licenses or approvals until they are paid. It is extremely hypocritical to hold the Tribes to a different standard based on the recommendations of a federal agency that also has no authority over Tribes when it comes to collecting fees as dictated by Tribal sovereign rights and their governing authority.

Page 45 and 46 – Paragraph 117 and 119

While the applicant is free to seek other means for this work outlined in these paragraphs, this does not mean that the Tribes have to accept this work in lieu of the work that our contractors would have performed. As has been demonstrated throughout Indian Country, Tribes possess specialized expertise in identifying properties of religious and cultural significance and this knowledge is confined to Tribal personnel. This knowledge base cannot be learned in academia therefore your archaeological consultants cannot possibly identify these resources despite their claims that they can.

Page 46 – Paragraph 120

> Consistent with the ACHP's guidance, we find that an applicant is not required to hire any particular person or entity to perform paid consultant services. To the contrary, we expect that competition among experts qualified to perform the services that are needed will generally ensure that the fees charged are commensurate with the work performed.

The only experts that matter are Tribal experts when it comes to identifying sites of religious and cultural significance. The FCC is selling our history to the lowest bidder with this report and order which is simply unacceptable.

Please feel free to contact the THPO at thpo@thlopthlocco.org or (918) 560-6113 if you have any questions or comments.

Please refer to THPO file number 2017-63 in all correspondence for this undertaking.

Sincerely,

Terry Clouthier
Thlopthlocco Tribal Town
Tribal Historic Preservation Officer